IN THE SUPREME COURT OF THE STATE OF NEVADA

GUILLERMO BELTRAN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 47570

FILED

JAN 08 2007

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count of trafficking in a controlled substance. First Judicial District Court, Carson City; William A. Maddox, Judge. The district court sentenced appellant Guillermo Beltran to serve a prison term of 10-25 years.

Beltran contends that the district court committed reversible error when it failed to conduct a Petrocelli hearing[1] to determine the admissibility of testimony about his alleged "other drug-related activity." During the State's direct examination of Detective Daniel Johnson, the prosecutor asked several general questions about the use of confidential informants and the setting up of controlled drug-buy meetings:

> Q. Sometimes you don't know who is going to show up?

[1]Petrocelli v. State, 101 Nev. 46, 692 P.2d 503 (1985), modified on other grounds by Sonner v. State, 114 Nev. 321, 326-27, 955 P.2d 673, 677 (1998).

> A. Well, in this case, we were dealing with someone by the name of Casper, who was known in Carson City to be Robert Nadon. We also knew that Mr. Nadon's source was a person by the name Memo.

Beltran was also known as "Memo." The district court sustained defense counsel's uncontested objection on hearsay grounds, and upon request, instructed the jury to disregard the comment about Memo. Beltran now argues that Detective Johnson's testimony implied that he had a criminal history, and evidence about alleged prior bad acts should have been the subject of a Petrocelli hearing. We disagree.

Detective Johnson's comment about Beltran being codefendant Nadon's source for drugs was not responsive to the prosecutor's question and not intentionally solicited by the State. The State did not argue in favor of the testimony's admission, and a Petrocelli hearing was not required. Moreover, the district court sustained Beltran's objection and instructed the jury to disregard the comment. This court "presume[s] that the jury followed the district court's orders and instructions."[2] Therefore, because the jury was admonished and Detective Johnson's unsolicited testimony was not admitted, Beltran cannot demonstrate that the district court erred.

In a related argument, Beltran contends that the trial testimony of Detectives Rory Planeta and Mitchell Pier also "implied that [he] was a known or suspected drug trafficker" and impermissibly

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[2]Allred v. State, 120 Nev. 410, 415, 92 P.3d 1246, 1250 (2004).

referenced prior bad acts requiring a Petrocelli hearing. Detectives Planeta and Pier's challenged testimony was that they recognized Beltran from a photograph. Additionally, Beltran argues that testimony from Detectives Johnson and Pier, "that they had heard of Beltran," also impermissibly referenced prior bad acts committed by Beltran. Beltran claims that the prosecutor had a duty to request a limiting instruction, and in the absence of such a request, the district court sua sponte should have instructed the jury on the limited use of prior bad act evidence. We disagree.

Initially, we note that Beltran did not object to any of the challenged testimony. The failure to raise an objection with the district court generally precludes appellate consideration of an issue.[3] This court may nevertheless address alleged error if it was plain and affected the appellant's substantial rights.[4] Here, we conclude that no error occurred. The testimony of Detectives Johnson, Planeta, and Pier, about knowing about Beltran and recognizing him from a photograph, did not implicate Beltran in any prior bad acts requiring a Petrocelli hearing or a limiting instruction to the jury. Their testimony was properly admitted for identification purposes as evidence that Beltran was present in the vehicle during the drug transaction with the confidential informant, Rudy Gage;

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[3]See Rippo v. State, 113 Nev. 1239, 1259, 946 P.2d 1017, 1030 (1997).

[4]See NRS 178.602 ("Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.").

and, Gage provided corroboration by testifying that Beltran ultimately took control of the money used in the purchase, and that he received the drugs after Beltran handed them to Nadon. Therefore, we conclude that Beltran's contention is without merit.

Next, Beltran contends that the prosecutor committed misconduct during closing arguments by (1) impugning his character and comparing him to a bottom-feeding catfish, and (2) vouching for the credibility of the State's witnesses. Beltran concedes that there was no objection to the prosecutor's comments, but argues that the misconduct amounted to reversible plain error.[5] We disagree.

The prosecutor began his closing argument by offering an analogy, comparing the use of confidential informants in controlled drug buys to catfishing. The prosecutor stated that in catfishing, "the bait you use is the foulest, smelliest, stinkiest stuff that you can use." In making this analogy, the prosecutor was referring to his own witness, Rudy Gage, in trying to explain to the jury the difficulties in using confidential informants in drug transactions, and acknowledging the obvious shortcomings of Gage as a witness, being a methamphetamine user and convicted felon. The prosecutor concluded his story by remarking that "[t]he good thing about this case is the State is not asking you [the jury] to rely solely upon the word of Rudy Gage to convict in this case." The prosecutor then proceeded to review the corroborating evidence.

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[5]See id.; Young v. State, 120 Nev. 963, 971-72, 102 P.3d 572, 577 (2004) (the failure to object to alleged prosecutorial misconduct precludes appellate consideration absent plain error).

Therefore, because the State was referring to its own witness, Beltran's claim that the prosecutor was impermissibly impugning his character is belied by the record and without merit.[6]

Beltran also contends that the prosecutor committed misconduct by vouching for two of the State witnesses – Rudy Gage, the confidential informant, and Detective Johnson. We disagree.

It is improper for a prosecutor to vouch for the credibility of a government witness.[7] "To determine if prejudicial prosecutorial misconduct occurred, the relevant inquiry is whether a prosecutor's statements so infected the proceedings with unfairness as to result in a denial of due process."[8] Additionally, "[a] prosecutor's comments should be viewed in context, and 'a criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone.'"[9]

In referring to Gage's work as a confidential informant, the prosecutor stated, "He may not be doing it right when Tri-NET is not watching, but he did it right when they were. That would be consistent with my sense of who Rudy Gage is." Considered in context, the prosecutor's statement was an attempt to convince the jury that Gage's testimony was trustworthy because he was being watched by the

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[6]See Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984).

[7]See United States v. Roberts, 618 F.2d 530, 533 (9th Cir. 1980).

[8]Anderson v. State, 121 Nev. 511, 516, 118 P.3d 184, 187 (2005).

[9]Knight v. State, 116 Nev. 140, 144-45, 993 P.3d 67, 71 (2000) (quoting United States v. Young, 470 U.S. 1, 11 (1985)).

detectives at all times while working as a confidential informant. Nevertheless, even assuming, without deciding, that the prosecutor erred by offering his "sense" of Gage, Beltran cannot demonstrate that the statement affected his substantial rights and amounted to reversible plain error.[10]

During the State's rebuttal closing argument, the prosecutor commented, referring to the testimony of Detective Johnson, that "[h]e testified to what he saw, credibly and honestly." The prosecutor's statement was made in direct response to defense counsel's allegation, made during Beltran's closing argument, that Detective Johnson was not physically in a position to see the movements taking place inside the vehicle where the controlled buy occurred, and therefore, his testimony about witnessing movements consistent with the exchange of money and drugs was not credible. Once again, even assuming, without deciding, that the prosecutor's comment was inappropriate, Beltran cannot demonstrate that the statement affected his substantial rights and amounted to reversible plain error.[11]

Therefore, having considered Beltran's contentions and concluded that they are without merit, we

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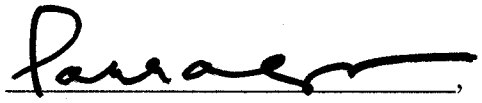
[10]See Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003) (stating that when conducting a review for plain error, "the burden is on the defendant to show actual prejudice or a miscarriage of justice").

[11]See id.

ORDER the judgment of conviction AFFIRMED.[12]



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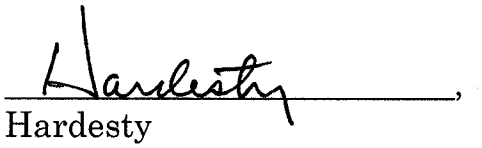

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cc: Hon. William A. Maddox, District Judge
Robert B. Walker
Attorney General Catherine Cortez Masto/Carson City
Carson City District Attorney
Carson City Clerk

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[12]We also reject Beltran's claim that cumulative error denied him his right to a fair trial. See Pascua v. State, 122 Nev. ___, ___ n.16, 145 P.3d 1031, 1035 n.16 (2006).